

Fayette Electrical Cooperative, Inc. and International Brotherhood of Electrical Workers, AFL-CIO, Local 2079, Petitioner. Case 16-RC-9405

September 30, 1992

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On August 7, 1991, the Board granted the Employer's request for review of the Regional Director's Decision and Direction of Election as it raised substantial issues warranting review.

Based on a careful review of the record, the Board concludes that the Regional Director erred in finding that the Employer is engaged in commerce within the meaning of the Act and in finding that it would effectuate the purposes of the Act for the Board to assert jurisdiction.

The Regional Director found that the Employer was not a "political subdivision" exempt from jurisdiction under Section 2(2) of the Act. The Employer argues on review that it is a political subdivision because it is administered by persons who are directly accountable to the general electorate.¹ Alternatively, the Employer argues that the petition should be dismissed because the Employer lacks sufficient authority over employees' wages, benefits, and other terms and conditions of employment to engage in meaningful and effective collective bargaining.

The Employer is a nonprofit electrical generating and transmission cooperative incorporated in the State of Texas in accordance with the Texas Electric Cooperative Act, Tex. Rev. Civ. Stat. Ann. art. 1528b, which provides for incorporation of nonprofit cooperatives to furnish electricity to members in rural areas. Each year the Employer generates revenue in excess of \$250,000 from its activities and is exempt from state sales tax and Federal excise and income taxes. The Employer has the power of eminent domain over private property, but not over property of the State of Texas or its political subdivisions. The statute provides that any three or more qualified persons may act as incorporators.

The Employer is the only entity providing electrical power in the eight rural counties which it serves. Persons desiring electrical service may apply for membership in the cooperative. There are no persons in the geographic area served who are not members of the Employer. The statute mandates that only those persons receiving electrical service from a cooperative may be

members of that cooperative. There were 9153 members at the time of the hearing.

The state statute requires that nonprofit electrical cooperatives, such as the Employer, have articles of incorporation providing for at least three directors to be elected at annual meetings of members. The Employer's territory is divided into seven districts. The Employer is governed by a board of directors comprised of one director from each of the seven districts. The directors must reside in the district they represent and must have been a resident for at least 1 year. The members of the board of directors receive \$50 per diem for their services. Public officials who are paid a salary for their position may not serve on the board of directors. In accord with the bylaws, the directors serve staggered terms of 3 years.

Each year an election is held for these directors' positions whose incumbents' terms are expiring that year. The persons residing in the affected district meet in a district meeting to select a nominee from that district for the open position. At the annual meeting, in which all persons who are members of the Employer may participate, the nominees are presented. Additional nominations may be made at that time by a member of the respective district. The entire membership present at the meeting then votes on the nominees.² Each person has one vote, and proxies are not allowed by the Employer's bylaws, although they would be permissible under the statute.

The statute provides for the calling of special meetings by a petition signed by 10 percent of the membership, and the bylaws specify a procedure for removal of board members by a vote of the membership. There is testimony that the membership of another electrical cooperative in the State removed its entire board of directors although the membership of the Employer has never done so.

The Employer is also accountable to its members through a complaint procedure set up and administered by the Texas Public Utility Commission (PUC), a state agency which can impose civil and criminal sanctions on the Employer.

The Employer is subject to regulation from both the PUC and the Rural Electrification Administration (REA), a division of the United States Department of Agriculture. The PUC has granted the Employer a certificate of convenience and necessity. The procedure for obtaining such a certificate includes publishing a notice of intent in the Texas Register and provides for a public hearing. In addition, in order to change its rates, the Employer must obtain approval from the PUC.

The Employer is closely regulated by the REA. The REA imposes certain requirements on the Employer's

¹ *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). The Employer, in its brief on review, states that it is not contending that it is created directly by the State, the "first prong" of the *Hawkins* test.

² The Regional Director erred in finding that the directors are elected by "the other members of their respective cooperatives."

accounting and management practices. The REA provides loans to the Employer as operating capital. The REA requires that the Employer provide detailed financial information, including employee salary, wage, and benefit information. If the various budget items are not in accord with the standards for a cooperative, the REA representative makes "suggestions" which can be enforced through the REA's power to withhold loan funds or even to relieve the cooperative manager of his duties. The REA must also approve the Employer's wholesale power contracts and construction contracts.

The PUC has similar oversight powers and demands similar information. The record states that if the PUC finds the budget items are "out of line," penalties, including personal penalties, can be assessed.

Financial records which are filed with either the REA or the PUC are available to the general public. Meetings of the Employer's board of directors are open to the public, with the exception of certain "pay-roll matters."

We agree with the Employer that its board of directors is responsible to the general electorate and, thus, it is a "political subdivision" within the meaning of the Act and is exempt from the Board's jurisdiction. In *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), the Supreme Court held that for an entity to be exempt from the Board's jurisdiction as a political subdivision, it must have been either directly created by the Federal, state, or local government or be administered by individuals who are responsible to public officials or the general electorate. The evidence indicates that the membership in the Fayetteville Electrical Cooperative is coextensive with residency in the geographical area served. There are no persons residing in the geographical territory served by the Employer who are not members of the Employer.

The Board, in both *Woodbury County Community Action Agency*, 299 NLRB 554 (1990), and *Economic Security Corp.*, 299 NLRB 562 (1990), found the nonprofit entities involved there to be exempt political subdivisions because a majority of the membership of the respective boards of directors were responsible to the general electorate. In each case, one-third of the board was comprised of elected public officials, and one-third were representatives of the poor, chosen at a secret-ballot election. Thus, two-thirds of the directors were found to be individuals responsible by law to public officials or the general electorate. Accordingly, because all directors of the Fayette Electrical Cooperative, Inc. are elected, according to democratic procedures, by the persons residing in the geographic area served by the Employer, they, like the representatives of the poor in *Woodbury*, supra, and *Economic Security*, supra, must be considered to be responsible to the general electorate.

The case at hand presents an even stronger argument for exemption from Board jurisdiction than *Woodbury* and *Economic Security* because the directors of the Fayette Electrical Cooperative, Inc. are elected not by a *subgroup* of the general electorate in the geographical area served, or by a defined insular class of voters, but by the *entire* electorate.³ Furthermore, unlike the statute and bylaws governing the nonprofit entities in *Woodbury* and *Economic Security*, the state legislation and corporation bylaws applicable to the Employer allow for the removal of any or all directors, during their term of office, by the membership.

We find *Natchez Trace Electric Power Assn.*, 193 NLRB 1098 (1971), enf. 476 F.2d 1042 (5th Cir. 1973), cited by the Regional Director, to be distinguishable. Unlike *Natchez Trace*, the Employer's membership is coextensive with the general electorate and directors may be removed by the membership/general electorate during their term of office. Furthermore, the Employer is exempt from state sales tax and Federal excise and income taxes. In addition, Fayette Electric Cooperative, Inc. was required to obtain a certificate of convenience and necessity from the PUC, and the certificate was issued only after public notice and hearing. The REA and PUC both closely regulate the Employer in such matters as rate increases and budget items. Most of the financial records and meetings of the Employer are open to the public. Thus, in addition to the fact its directors are responsible to the general electorate, the Employer possesses other characteristics required for exemption from the Board's jurisdiction under Section 2(2) of the Act.⁴ Accordingly, the petition is dismissed.

ORDER

The petition is dismissed.

MEMBER OVIATT, dissenting.

I do not agree that the Employer is a "political subdivision" within the meaning of Section 2(2) of the Act. I also find that the Employer has not met its burden of showing that it does not have the ultimate authority to determine the primary terms and conditions of employment, as required by *Res-Care, Inc.*, 280 NLRB 670 (1986). Accordingly, like the Regional Director, I would process the petition.

As more fully discussed in my dissent in *Economic Security Corp.*, 299 NLRB 562 (1990), to be an exempt political entity within the meaning of Section 2(2) of the Act, an Employer must demonstrate not

³ Chairman Stephens, who dissented in *Woodbury*, joins in the Board's conclusion on the basis of this distinction.

⁴ Because we find that the Employer is exempt from the Board's jurisdiction as a political subdivision, we find it unnecessary to consider the Employer's alternate position that its lack of control over determination of terms and conditions of employment precludes the possibility of meaningful and effective bargaining.

only that its directors are *chosen* by the electorate but also that its directors can be *removed* by the electorate. Only in this way, in my view, can the Employer satisfy the requirement in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), that it is administered by individuals who are responsible to the general electorate.

This case is not materially different from *Economic Security*. In *Economic Security*, *supra*, I noted that the bylaws conferred on the directors *alone* the power to amend the bylaws and thus to increase the directors' term of office and to abolish any removal procedure. Nothing in the organic statute or in the bylaws themselves precluded the directors from doing so, and the electorate had no say in the matter. *Id.* at 567. I observed that to the extent the bylaws conferred on the directors some degree of responsibility to the electorate, the directors were "so accountable by choice rather than by law." *Id.* (quoting from *Jefferson County Community Center v. NLRB*, 732 F.2d 122, 125 fn. 3 (10th Cir.), cert. denied 469 U.S. 1086 (1984)). That was not sufficient, in my view, to make them responsible to the electorate within the meaning of *Hawkins County*.

In *Economic Security* only a quorum of the board of directors could remove a director. Here, under the bylaws, the members themselves can remove a director, but the term of a director's office (now 3 years) and the procedure for removing directors is set not by the organic statute¹ but by the bylaws. Significantly, these bylaws can be amended only by a vote of two-thirds of the board of directors—not by the members. (See art. XIV of the bylaws.) Here, as in *Economic Security*, the directors can, by amending the bylaws them-

selves, abolish or amend the removal procedures and increase their term of office. There is nothing in the organic statute or in the bylaws that gives the members any power to prevent this from happening. The members' removal power in this case is thus transitory at best.

In my view, the directors here do not have the type of responsibility to the electorate that qualifies the Employer as a political subdivision under Section 2(2) of the Act. See *Skills Development Services v. Donovan*, 728 F.2d 294, 300 (6th Cir. 1984); *Powell v. Tucson Air Museum Foundation of Pima*, 771 F.2d 1309, 1311–1312 (9th Cir. 1985); *Williams v. Eastside Mental Health Center*, 669 F.2d 671, 679 (11th Cir.), cert. denied 459 U.S. 976 (1982); and *St. Jude Industrial Park Board v. NLRB*, 760 F.2d 223, 225–226 (8th Cir. 1985).

The Employer also now contends, in the alternative, that, pursuant to *Res-Care, Inc.*, 280 NLRB 670 (1986), the Board should decline jurisdiction because of the extent of control of the Employer's operations exercised by the Rural Electrification Administration and the Texas Public Utility Commission. The Employer has not, however, met its burden of showing that the control exercised by these agencies is so extensive as to preclude meaningful collective bargaining. Thus, the Employer has not introduced evidence, for example, on whether a collective-bargaining agreement would require approval by these agencies or whether these agencies would effectively control wage rates. In my opinion, the Employer has not satisfied its burden under *Res-Care*, *supra*.

In sum, I conclude, as did the Regional Director, that the Employer is not an entity exempt from our jurisdiction. Accordingly, I would process the election petition.

¹ Contrary to the majority's contention, art. 12586 does not contain any provision regarding the removal of directors.